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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

No. 686 Term, 1956

COMMONWEALTH OF PENNSYLVANIA

vs.

ANTHONY TONTY,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND TO THE SUPERIOR COURT OF PENNSYLVANIA

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vs.

Anthony Tonty

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Petitioner, Anthony Tonty, prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above entitled case on July 21, 1955, and the refusal of the Supreme Court of Pennsylvania to allow an appeal from said judgment.

OPINIONS BELOW

The opinion of the Superior Court is reported in 178 Pa. Superior Court 447, 115 A. 2d 833. The Supreme Court of Pennsylvania did not render an opinion.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was pronounced on July 21, 1955 and a Petition for Allowance of Appeal was presented to the Supreme Court of Pennsylvania on July 29, 1955, filed at No. 2034A, Misc. Docket, and on November 15, 1955 was refused.

The Act of Assembly of the Commonwealth of Pennsylvania on June 24, 1895, P. L. 212, Section 7 (amended May 21, 1941, P. L. 47, Section 1), and Section 7(a) (17 P.S. Sections 181 and 182) provides:

> "It [the Superior Court of Pennsylvania] shall have exclusive and final appellate jurisdiction of all appeals in the following classes of cases: • • •
>
> All proceedings of any kind in the Court of Quarter Sessions of the Peace, or before any judge thereof, except in cases involving the right to a public office,

in which case the remedy by appeal to the Supreme Court shall not be affected by this Act".

The said Act of 1895, Section 7(e), 17 P.S. Section 190 provides:

"Nevertheless in any action or proceedings whatever above committed to the final and exclusive decision of the said court there may still be an appeal from its judgment to the Supreme Court: • • •

Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; • • •

Fourth. If the appeal to the Supreme Court be especially allowed by the Superior Court itself or by any one justice of the Supreme Court."

The defendant, petitioner herein, presented his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania on July 29, 1955 and on November 15, 1955 the petition was refused, without opinion. The jurisdiction of this Court is invoked under the provisions of the Act of Congress, June 25, 1948, c. 646, 62 Stat. 929, 28 USCA sec. 1257(3).

QUESTIONS PRESENTED

---

1. Was the petitioner deprived of his right to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States, when he was required

to stand trial on indictments found by a grand jury, which was or might have been prejudiced against him by reason of the actions and words of the Assistant District Attorney in the presence of the said grand jury?

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution (USCA, Constitution, Part 3, page 2), which reads as follows:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

STATEMENT OF THE CASE

I. Procedural History of the Case

The petitioner was charged with conspiracy and bribery. On November 5, 1954 a true bill was found by the Grand Jury on indictments charging petitioner, Anthony Tonty, alias Arch Tonty, with the crimes of conspiracy to bribe a police office or police officers of the City of Erie, Pennsylvania, and of offering bribes to Edward Camilli and Russell Verga, police officers, to influence them in the performance and non-performance of their official duties by wilfully failing to perform the laws of Pennsylvania pertaining to gambling in violation of the Act of June 28, 1951, P. L. 622, Section 9 (53 P.S. Section 12, 198-911), known as the Third Class City Code. At the close of the trial the charge of conspiracy was withdrawn by the trial judge and the case submitted to the jury on three charges of bribery.

Before the trial, a motion to quash the indictments was presented. The grounds being, inter alia, the highly prejudicial actions and words of the Assistant District Attorney in the indicting grand jury room which would prevent an unbiased consideration of the evidence submitted to the grand jury, and, therefore, result in an unfair trial of the defendant. Testimony was taken on the motion which appears at pages 84a to 155a of the certified Record submitted herewith, and was overruled by the majority of the court en banc, i.e., Hon. Elmer L. Evans, P. J.,

Burton R. Laub and Samuel Y. Rossiter, JJ., and while no majority opinion was filed, a dissenting opinion was entered by Judge Rossiter which will be found at page 27 of the Appendix.

The petitioner was found guilty of the charges of bribery and filed timely motions in arrest of judgment and for a new trial. In these motions and reasons in support thereof, he again urged that he had been deprived of a fair trial because of the prejudicial actions and words of the Assistant District Attorney in the grand jury room. The said motions were overruled and on January 6, 1954, petitioner was sentenced as follows:

> "And now, January 6th, 1955, the Court sentences the defendant Anthony Tonty alias Arch Tonty to pay a fine of Five Hundred ($500.00) Dollars to the Commonwealth (for the use of the County of Erie), pay the costs of prosecution, and undergo an imprisonment in the Allegheny County Workhouse for an indefinite term, the minimum of which shall be One (1) Year and the maximum Two (2) Years, to be computed from the date of commitment, to wit: January 6th, 1955, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.
>
> Elmer L. Evans,
> *President Judge.*

(Note—The Sentence of the Court entered in cases Nos. 401 and 402 November Sessions, 1954 is identical to the above but contains the additional pro-

vision, 'to run concurrently with the sentence imposed this date under Case No. 400 November Sessions, 1954.')"

On January 8 and 20, 1954 defendant filed his appeals to the Superior Court of Pennsylvania again raising, inter alia, the question of his right to a fair trial. The Superior Court affirmed the action of the Court of Quarter Sessions, and on July 29, 1954, defendant filed his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, again urging, inter alia, that he had been deprived of a fair trial, as guaranteed by the Constitution of the United States. The Supreme Court refused to review the judgment of the Superior Court on November 15, 1955. Petitioner, therefore, has no further remedy for review in the State Courts of Pennsylvania.

II. The Facts Material to the Questions Presented

This prosecution was one of many growing out of an extensive investigation or probe into the activities of City officials and police in the City of Erie, Pennsylvania. Petitioner was the proprietor of the Esquire News, a place of business located at 22 West 12th Street in Erie, and in which he sold ice cream, candy, newspapers and similar items. The Commonwealth contended that he took bets on horses and wrote numbers. Although he was accused of offering bribes to two police officers to influence them in the performance or non-performance of their duties relative to the enforcement of the gambling laws, only one was produced and testified against him, Russell Verga. Petitioner made an effort to call the other police officer

to the witness stand in his defense and to rebut the testimony of Verga, but he could not be located. Petitioner took the stand in his own defense and either denied the testimony of Verga or gave his explanation of the same. He was corroborated in many particulars by his employee, a clerk in the said store.

The questions presented in this petition have to do with the activities of the Assistant District Attorney in the Grand Jury Room. While the Grand Jury was in session and the testimony was being presented before them, the Assistant District Attorney, one Herbert Johnson, Jr., went into the Grand Jury Room with a gun in his hip pocket and stated to one juror, in the presence of all, that if he "did not have it (gun) he would feel naked if he should run into one of the boys", meaning the defendants. Further, he acted in the dual capacity of Assistant District Attorney and witness, sworn and unsworn. Testimony was taken before the Court en banc on a motion to quash the Indictments found by this Grand Jury, in the course of which testimony the Assistant District Attorney attempted to explain his activities relative to testifying, but did not deny the gun incident. The Court en banc refused the motion to quash, without opinion, but Judge Rossiter filed a dissenting opinion strongly condemning the activities of the Assistant District Attorney (App. p. 27).

III. Federal Question Raised Below in Trial Court and Before the Superior and Supreme Courts of Pennsylvania

(a) In Trial Court:

1. Motion to quash Indictment on the ground, inter alia,

"8. Defendant has been informed and believes that Herbert Johnson, Jr., Esq., Assistant District Attorney, created a prejudicial atmosphere detrimental to the defendant in the grand jury room and at a time when the grand jury was receiving evidence against the defendant by wearing a pistol and explaining to the grand jury room that 'he would feel naked without it if he met any of these people', therefore meaning the defendant and defendants accused." • • •

"10. Defendant has been informed and believes that Herbert Johnson, Jr., Esq., Assistant District Attorney, appeared before the grand jury and gave testimony against defendant and others while unsworn, and further corrected, explained and amplified the testimony of the witness Russell Verga at times when the said Herbert Johnson, Esq. was not sworn." (App. pp. 25-26)

2. Motion in Arrest of Judgment (App. p. 29).

(b) In the Superior Court of Pennsylvania:

In his Statement of the Questions Involved, his first question is that relative to the prejudicial actions of the Assistant District Attorney, being as follows:

"1. Did the Court below err in refusing to quash the indictments because of the prejudicial action of the Assistant District Attorney:

(a) In going into the Grand Jury Room with a gun in his hip pocket and stating to one juror in the presence of all that if he did not have it (gun) he

would feel naked if he should run into one of the boys, meaning the defendants?

(b) In acting in the dual capacity of assistant district attorney and witness, sworn and unsworn?" (App. p. 60)

(c) In the Supreme Court of Pennsylvania:

Petition for Allowance of Appeal, both in the body of the Petition, Paragraphs 17, 18 and 19, and also in the prayer of the Petition under sub-paragraphs (c), (d) and (e) (App. pp. 67-69 and 74-75).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED IN THE INSTANT CASE BECAUSE AN IMPORTANT QUESTION AFFECTING THE RIGHTS OF ACCUSED UNDER THE FOURTEENTH AMENDMENT IS INVOLVED

The "due process" clause of the Fourteenth Amendment requires that the accused be afforded not only a fair and impartial trial but also that all the incidents of trial be fair and without prejudice to his rights. Counsel has been unable to find a case presenting the factual situation in the instant case where the District Attorney or Assistant District Attorney goes into the Grand Jury Room wearing a gun on his person and making statements in the presence of the Grand Jury indicating his fear of the proposed defendants, and also testifies both when sworn and unsworn. While it is true that ordinarily when a claim of prejudice is set up by accused, the burden is on him to show such prejudice, it is likewise true that in a situation like the present, the Court should find prejudice from the bare facts of the case. The gun incident is not denied by the Assistant District Attorney (See dissenting opinion of Judge Rossiter, App. p. 27).

In Pennsylvania, one of the essential incidents of a fair trial is the finding of an indictment by a Grand Jury, the return of a "true bill." So important is this that for

an irregularity in the said indictment it will be quashed on motion. The accused is not heard nor does he produce witnesses in his behalf before the Grand Jury. Therefore, more than ever is it important that the ex parte hearing, which forms the basis of the Grand Jury finding, be free from prejudice, coercion or other unlawful attributes.

As said in *Hoffman v. United States,* 341 U.S. 470, 71 Supreme Ct. 814-817, quoting from *Hale v. Henkel,* 201 U.S. 43, 26 Supreme Ct. 370, 373:

> "The most valuable function of the grand jury [has been] not only to examine into the commission of crimes but to stand between the prosecutor and the accused."

The Constitution of the United States requires "due process" according to the established forms of the state, that is, a criminal prosecution "conducted according to the settled course of judicial procedure as established by the law of the state." *Frank v. Mangum,* 237 U.S. 309, 35 S. Ct. Rep. 582, at 586, followed by the Supreme Court of Pennsylvania in *Commonwealth ex rel. McGlinn v. Smith,* 344 Pa. 41, 52, 24 A. 2d 1.

In *Commonwealth v. Liebowitz,* 143 Pa. Superior Ct. 75-80, 17 A. 2d 719, it is said:

> "Section 10 of the Declaration of Rights, PS Const. art. 1, § 10, recognizes indictment as the method of informing an accused person (in the words of section 9 of the Declaration of Rights) of the nature and cause of the accusation against him; an indictment can only be found in this Commonwealth by a grand jury; and the legislature cannot abolish the grand

jury. Dauphin County Grand Jury Investigation Proceedings (No. 2), 332 Pa. 342, 353, 354, 357, 2 A. 2d 802, 804."

It is apparent, therefore, that the importance of the proceedings before the Grand Jury cannot be overemphasized. In *Commonwealth v. Wadley,* 169 Pa. Superior Ct. 490, 83 A. 2d 417, the Appellate Court of Pennsylvania reversed a conviction of the crime of mayhem for the reason that the charge of mayhem was ignored by the Grand Jury and the case was tried for a number of charges without excluding mayhem. The Superior Court at page 493 says:

"It will be observed, to begin with, that appellant's constitutional rights were violated. 'No person shall, for any indictable offense, be proceeded against criminally by information': Constitution of Pennsylvania, Art. I, § 10. 'In all criminal prosecutions the accused hath a right . . . to demand the nature and cause of the accusation against him . . .': Id. Art. I, § 9. The prohibition in § 10 and the guarantee in § 9 provide and require an indictment as the only process whereby an accused can be brought to trial for an indictable offense. Dauphin Co. Grand Jury Investigation Proceeding (No. 2), 332 Pa. 342, 354, 2 A. 2d 802. 'No man can be tried for a crime except upon a bill of indictment duly found by a grand jury': Hartranft's Appeal, 85 Pa. 433, 453. See 42 C. J. S., Indictments and Informations, § 1; 27 Am. Jur., Indictments and Informations, § 2."

The crime of which this defendant has been convicted, namely, bribery of a police officer or officers, is prohibited

by the Third Class City Code of Pennsylvania, June 28, 1951, P.L. 622, § 9 (53 P.S. § 12, 198-911). It is so serious that it carries with it a penalty of a fine not exceeding $10,000 and imprisonment not exceeding five years, and provides further that the convicted person "shall be forever incapable of holding any place of profit or trust in this Commonwealth." It cannot be argued, therefore, that a crime of this magnitude is not an "indictable offense" under the Pennsylvania Constitution.

The foregoing references to the Pennsylvania Constitution are made not for the purpose of seeking their enforcement by the United States Supreme Court, but to show that the proceeding by indictment before a Grand Jury and the necessity of the finding of a True Bill before an accused may be put to trial is "the settled course of judicial proceedings as established by the laws of the State of Pennsylvania." Further, the proceedings before the Grand Jury are required to be free from prejudice, coercion or other unlawful attributes. The True Bill returned by the Grand Jury must be based upon evidence alone; otherwise, it is not a legal indictment, and any proceedings based upon it must be set aside as a violation of the constitutional rights of the accused to due process under the Federal Constitution.

In the case at bar, this right of the accused was flagrantly violated by the Commonwealth when the Assistant District Attorney walked into the Grand Jury Room with a gun on his person and stated in the hearing of the Grand Jury his fear of the defendants, among whom was Anthony Tonty, this petitioner. The court below and the Superior Court of Pennsylvania made light of the incident.

The court below did conduct a hearing after the motion to quash was filed, but a majority decided to refuse the motion. Judge Rossiter, a member of the court en banc, in his dissent perhaps gives the best argument which could be presented in favor of the petitioner:

"Memorandum Dissenting Opinion

Rossiter, J.

I can neither overlook nor condone an assistant district attorney going before a grand jury in session with his superior, the district attorney, with a revolver, noticeably bulging from his hip pocket and when queried by a woman grand juror stating:

> "He (Johnson) claimed he would feel naked if he didn't have it (the gun) if he would run into one of the boys; one of the defendants, he meant".

thereby, in effect, accusing all defendants whose cases were then pending before the grand jury as being such desperate characters as not to stop short of murder, even in the Court House. This certainly was most unfair to the defendants involved and it was unfair to the grand jury itself by subjecting it to an ominous cloud which deprived it of that surrounding of calmness and fairness which should be concomitant with any grand jury's deliberation and which it is the legal duty of the district attorney to preserve rather than to destroy. In our view all this gun play was entirely unnecessary for any protective purposes whatsoever as there were plenty of policemen especially assigned to the district attorney's office for this term, his own county detectives and the sheriff's deputies readily

available every minute in immediate proximity to the grand jury room.

The assistant district attorney readily took the stand to deny the defendant's allegations as to his prompting both the district attorney and the main prosecuting witness, Verga, in the hearing of the grand jury relative to the receipt and allocation of alleged bribe money (filling in the gaps as alleged by defense counsel) but he did not see fit to explain the revolver matter. If he was genuinely afraid personally amidst the aforementioned special policemen, county detectives and sheriffs that was one thing; if he was not genuinely afraid then his revolver wearing could be for no other purpose than to be improperly impressive and distractive to the grand jurors in their sworn duty of fairly and dispassionately evaluating the Commonwealth's evidence without the injection into their deliberations of an extraneous pocketed revolver, the knowledge of which always makes any normal being shudder. As indicated, the assistant district attorney did not see fit to say which of the alternatives mentioned was which.

From the testimony of the grand juror quoted, unobjected to and not denied, and from the oral argument of the district attorney that his assistant had the right of self protection it is only fair to assume that the bulging revolver was with the assistant district attorney all the time he was before the grand jury. This, in my opinion, is sufficient to taint all of the indictments and is sufficient cause for quashing all of the same with leave to resubmit them to the next grand jury under proper auspices and causes me, with due respect to my learned colleagues, to dissent from their decision not to quash.

What is here stated may be noted of record in all the cases where motions to quash have been made on the aforesaid grounds.

Samuel Y. Rossiter, *J.*"

The Opinion of the Superior Court in this case and in the *Schwartz* case, which is referred to therein, the relevant portion of which is printed in the appendix, finds no prejudice or rather finds that petitioner did not show prejudice (App. p. 37). It is the contention of the petitioner that the action of the Assistant District Attorney was of such a nature that prejudice was to be presumed. The Grand Jury might well ask what sort of person this defendant was, what heinous criminal he must be when the Assistant District Attorney finds it necessary to protect himself by being armed during the examination of witnesses by the Grand Jury. The extremely slight testimony of even one witness would be sufficient basis for a true bill under such circumstances.

The second reason urged for the quashing of the indictments was that the Assistant District Attorney acted in the dual capacity of a witness and assistant prosecutor or special attendant upon the Grand Jury. District Attorney McLaughlin did present the evidence to the Grand Jury and did question witnesses, but he was assisted in his duties as District Attorney by Mr. Johnson. The testimony which was taken on the motion to quash and which is printed in the certified record in this case, plainly shows that the accusation of the defendant as to the activities of Mr. Johnson is sustained by the evidence. As testified to by one of the Grand Jurors, Mr. McLaughlin had told

them that Mr. Johnson was an Assistant District Attorney and had been active in the investigation; that Mr. Johnson "gave an explanation" of the investigation he had made (103a). Mr. Johnson admitted at the hearing on the Motion to Quash that he was sworn as a witness by the Grand Jury and testified in the case of Pete Marty, one of the defendants involved, and that such testimony consisted of the showing of moving pictures during the time a contact was made between Pete Marty and Officer Verga (102a). Officer Verga was the principal witness for the prosecution in these cases against Anthony Tonty, this defendant. Mr. Johnson admitted also that he testified in the case involving the conspiracy charges against Flatley, Martin, Soscia, Schwartz and the other defendants; that his testimony consisted in reading the statements given by Soscia, Schwartz and Flatley (103a). He said that he left the Grand Jury room immediately after this, but that later the Grand Jury requested that he come back and read a portion of the Schwartz statement, which he did and immediately withdrew (103a). On cross examination he stated that it was the second day that he showed the film in the case of Marty, and was at the end of the presentation of that case (104a). Apparently Mr. Johnson, during the first day up and until the end of the Marty testimony, had been acting in his official capacity as Assistant to the District Attorney. He admitted he had been in the Grand Jury room the first day and that he was in and out practically all the time during the session except when they were deliberating (105a). He admitted that he conversed with members of the Grand Jury during the recess and at other times; that the Minifon was brought in and he thinks that Verga showed them the Minifon during a recess

(113a). He admitted also that when he was showing the pictures he may have pointed out to the Grand Jury to watch where he, Marty, goes for the shirt pocket when he puts his hand in the shirt pocket; he admitted further that during the course of the investigation the District Attorney asked him a great number of questions and conferred with him many times (125a). When the Grand Jury directed questions to him, Johnson, he referred them to Mr. McLaughlin, and the matter was cleared up either by McLaughlin or by Verga (126a).

Frank Wrozynski, one of the Grand Jurors, testified that even when he was not sworn as a witness, Mr. Johnson explained matters to the jury, such as that $25 was paid by this man and $25 by that man (86a). Although Mr. Johnson had testified that he referred the questions of the Grand Jury to the District Attorney for answer, Mr. Kedzierski, Grand Juror, said that he himself asked Mr. Johnson a question to the effect that if Camilli ever returned the money that he got, and Johnson said "yes, he did, or he tried to;" and that Mr. Johnson was not on the witness stand at that time, that he was standing up gathering up the papers (150a).

Mr. James L. McCarthy, as well as Mr. Kedzierski, testified that Mr. Johnson had a list and corrected dates when Mr. McLaughlin was reading the dates to the jury, that is, the dates in the testimony of Russell Verga; that they could hear these corrections (132a-133a and 144a).

It also developed during the testimony of Edward Kedzierski, that immediately before Officer Martin came into the Grand Jury room to testify the District Attorney and the Assistant District Attorney, Mr. Johnson, told them that Mr. Martin was an officer, that he knew he had

done wrong and that they should take it easy on him with the questions (147a-148a).

A consideration of the foregoing testimony, both as to the gun and the activities of Mr. Johnson in acting both as a witness and a prosecuting attorney, will indicate that there is a failure of justice in the manner in which these indictments were presented to the Grand Jury. In 23 *C. J. S.* 519, sec. 1081, it is said that "It is the duty of the presecuting attorney to be fair and impartial in the trial of a person accused of crime."

In Re: Commonwealth v. Bane, 39 D. & C. 664, the Court of Quarter Sessions of Washington County quashed indictments because of the prejudicial and illegal manner in which the defendants were examined before the Grand Jury. In the opinion the learned judge says at page 674:

> "Every man, whatever the offense of which he may be suspected, is as much entitled to the just, impartial and unbiased judgment of a grand jury as he is to that of a petit jury on his final trial. It is as essential that the one body as the other should be permitted to act free from sway or control from any source, and without fear or favor. The temptation to disregard these safeguards of the rights of persons accused is often great, though happily, the instances are few where it has been yielded to."

The District Attorney and, in this case, the Assistant District Attorney, acts in the capacity of a judge in that he instructs the Grand Jury on matters of law, and he questions the witnesses called before the Grand Jury. As one person cannot legally act in the capacity of judge, prosecutor and witness in the same proceeding and before

the same jury, certainly the District Attorney cannot do so.

In *Commonwealth v. Bradney et al.*, 126 Pa. 199, 17 A. 600, the Court says at page 205:

> "The district attorney is the attendant of the grand jury; it is his duty as well as his privilege to lay before them matters upon which they are to pass, to aid them in their examination of witnesses, and to give them such general instruction as they may require. But it is his duty during the discussion of the particular case and while the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence and to apply it to the case in hand; any attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced is in the highest degree improper and impertinent * * * "

In *Sadler's Criminal Procedure* (2d ed.), sec. 222, pp. 267-268, the rule is stated thus:

> "It is the duty of the district attorney to bring before it (the grand jury) each case as it arises, and see that the proper witnesses are forthcoming, and if necessary, open the case, commence and superintend the examination of witnesses, and give instructions on all questions of law. It is his duty as well as his privilege to do so."

In 58 *Am. Juris.* 112, sec. 155, after pointing out that the District Attorney may be a competent witness, the writer continues:

> "However, some courts point out the impropriety of a prosecutor being a witness for the state and an advocate in the same action, on account of his liability

to be prejudiced, and the difficulty of the jury in discriminating between the evidence given under oath and that stated in the argument."

Note 13 cites: *Robinson v. U. S.* (CCA 8), 32 F. 2d 505 (66 A.L.R. 468), where in the Opinion at page 510 the Court says:

"The function of a prosecuting attorney and a witness should be disassociated. A jury naturally gives to the evidence of the prosecuting attorney far greater weight than to that of the ordinary witness. * * * The tendency of a situation where a prosecutor in a criminal case becomes a witness for the government is to prevent somewhat that fair trial to which a defendant is entitled."

In *Maginnis's Case,* 269 Pa. 186, 112 A. 555, a disbarment proceeding, the Court said at page 197:

"As respondent was instructed by one of his judges at the hearing of the rule, it is not for him (the assistant district attorney) to try defendants before the grand jury. His duty is simply to see that the evidence of the prosecution is sufficiently produced before that body, and to give the jurors such general instructions on the law as they may require of him."

The general rule as to attorneys appearing as trial lawyer and witness in the same case has been stated in the following cases thus:

Otto Will, 349 Pa. 205, 36 A. 2d 797:

"1. The practice of an attorney appearing as both a witness and an advocate in the trial of a case or in the argument of a case on appeal is condemned." Opinion, p. 211:

"An attorney who does this, except in those rare instances where an adverse party puts him on the stand as a witness, commits a breach of good professional taste, as this court pointed out in Smith to use vs. Smith, 294 Pa. 347, 144 A. 290."

Teats vs. Anderson, 358 Pa. 523, at 530 (58 A. 2d 31):

"It is manifestly improper for a lawyer to act in the one case in the dual role of advocate and material witness, except as to a formal matter such as the attestation or custody of an instrument and except when he may be called for cross examination by opposing counsel."

In the trial that followed, petitioner contends that the testimony was extremely meager upon which he was convicted. This was a question for decision by the State Courts and therefore is not raised in this petition.

Under the law of Pennsylvania, above referred to, the Supreme Court of Pennsylvania should have granted the petition for allowance of appeal inasmuch as a constitutional question was involved.

Therefore, petitioner respectfully requests that a writ of Certiorari issue to the Superior Court of Pennsylvania and to the Supreme Court of Pennsylvania.

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APPENDIX

I.

MOTION TO QUASH INDICTMENTS

And now, to-wit, this 30th day of November, 1954, prior to the selection and swearing of the Jury in the above-captioned matter, the defendant, Anthony Tonti, through his attorney, respectfully moves Your Honorable Court to Quash the Indictments cited above for the following reasons:

* * * * * * * *

4.

Defendant has been told and believes that Herbert Johnson, Jr., Esq. whose name does not appear on defendant's indictments, testified against him in the Grand Jury proceedings and that said witness was improperly and illegally sworn by the Foreman of said Jury.

* * * * * * * *

7.

Herbert Johnson, Jr., Esq., Assistant District Attorney, appeared before the Grand Jury in the dual role of Prosecuting Attorney and unsworn witness with first hand knowledge of the investigation.

Wherefore, the defendant moves Your Honorable Court to Quash the indictments cited above and requests that a hearing date be set at which time defendant can offer testimony in substantiation of the above allegations.

EDW. E. PETRILLO
Attorney for Defendant

II.

MOTION TO AMEND PENDING MOTION TO QUASH INDICTMENTS

And now, to-wit, this 2nd day of December, 1954, comes the defendant, Anthony Tonty, by Edward E. Petrillo, his Counsel, and moves the Honorable Court for leave to amend the motion heretofore filed in the above captioned cases by adding to the same the following paragraphs, numbered respectively 8, 9 and 10:

8. Defendant has been informed and believes that Herbert Johnson, Jr., Esq., Assistant District Attorney, created a prejudicial atmosphere detrimental to the defendant in the Grand Jury Room and at a time when the Grand Jury was receiving evidence against the defendant by wearing a pistol and explaining to the Grand Jury that, "He would feel naked without it if he met any of these people", therefore meaning the defendant and defendants accused.

9. Defendant has been informed and believes that the District Attorney and the Assistant District Attorney, while present in the Grand Jury Room before the convened Grand Jury, instructed the Jurors not to ask questions of one John Martin, a principal witness in the cases who had originally pleaded guilty, who was about to be called before the Jury for presenting evidence in the cases including that of the defendant.

10. Defendant has been informed and believes that Herbert Johnson, Jr., Esq., Assistant District Attorney, appeared before the Grand Jury and gave testimony against the defendant and others while unsworn, and further, called, explained and amplified the testimony of the witness, Russell Verga, at times when the said Herbert Johnson, Jr., Esq., was not sworn.

EDWARD E. PETRILLO
Attorney for Defendant

ORDER

Motion granted Dec. 2, 1954.

ELMER L. EVANS, *P. J.*

III.
MEMORANDUM DISSENTING OPINION

Rossiter, J.

I can neither overlook nor condone an assistant district attorney going before a grand jury in session with his superior, the district attorney, with a revolver, noticeably bulging from his hip pocket and when queried by a woman grand juror stating:

> "He (Johnson) claimed he would feel naked if he didn't have it (the gun) if he would run into one of the boys; one of the defendants, he meant".

thereby, in effect, accusing all defendants whose cases were then pending before the grand jury as being such desperate characters as not to stop short of murder, even in the Court House. This certainly was most unfair to the defendants involved and it was unfair to the grand jury itself by subjecting it to an ominous cloud which deprived it of that surrounding of calmness and fairness which should be concomitant with any grand jury's deliberation and which it is the legal duty of the district attorney to preserve rather than to destroy. In our view all this gun play was entirely unnecessary for any protective purposes whatsoever as there were plenty of policemen especially assigned to the district attorney's office for this term, his own county detectives and the sheriff's deputies readily available every minute in immediate proximity to the grand jury room.

The assistant district attorney readily took the stand to deny the defendant's allegations as to his prompting

both the district attorney and the main prosecuting witness, Verga, in the hearing of the grand jury relative to the receipt and allocation of alleged bribe money (filling in the gaps as alleged by defense counsel) but he did not see fit to explain the revolver matter. If he was genuinely afraid personally amidst the aforementioned special policemen, county detectives and sheriffs that was one thing; if he was not genuinely afraid then his revolver wearing could be for no other purpose than to be improperly impressive and distractive to the grand jurors in their sworn duty of fairly and dispassionately evaluating the Commonwealth's evidence without the injection into their deliberations of an extraneous pocketed revolver, the knowledge of which always makes any normal being shudder. As indicated, the assistant district attorney did not see fit to say which of the alternatives mentioned was which.

From the testimony of the grand juror quoted, unobjected to and not denied, and from the oral argument of the district attorney that his assistant had the right of self protection it is only fair to assume that the bulging revolver was with the assistant district attorney all the time he was before the grand jury. This, in my opinion, is sufficient to taint all of the indictments and is sufficient cause for quashing all of the same with leave to resubmit them to the next grand jury under proper auspices and causes me, with due respect to my learned colleagues, to dissent from their decision not to quash.

What is here stated may be noted of record in all the cases where motions to quash have been made on the aforesaid grounds.

SAMUEL Y. ROSSITER, *J.*

IV.
MOTION IN ARREST OF JUDGMENT

And now, to-wit, this 8th day of December, 1954, Anthony Tonty, the defendant in the above-entitled case, and against whom a verdict of guilty was entered in said case on the 7th day of December, 1954, moves the Court to arrest judgment against him for the following reasons:

1. The Grand Jury proceedings in this case were irregular and improper, and the indictments were obtained by evidence improperly presented to the Grand Jury, and through improper conduct on the part of the Assistant District Attorney and the District Attorney himself.

* * * * * * * *

The defendant, therefore, prays that the motion be sustained and that the judgment of conviction against him be arrested.

And he will ever pray, etc.

EDWARD E. PETRILLO,
Attorney for Defendant.

ORDER

Dec. 30, 1954, Motion dismissed and refused.

By Court en Banc,
ELMER L. EVANS, *P.J.*
BURTON R. LAUB, *J.*

V.

OPINION OF THE COURT OF QUARTER SESSIONS

In The Court of Quarter Sessions of Erie County, Pennsylvania

Nos. 400, 401, 402 November Sessions, 1954

OPINION

Evans, P. J.:

The defendant has appealed from an order of this court refusing motions for a new trial and arrest of judgment following verdicts and sentence of the defendant on three charges of bribery. It, therefore, becomes necessary for us to indicate in this opinion our conclusions to support our action. Seven reasons for a new trial are set forth in the motion therefor, and five reasons in support of the motion in arrest of judgment are advanced. Subsequently two additional reasons for new trial were filed.

We will first deal with the motion for new trial, and in the order presented consider the points raised.

Contentions numbers 1 and 2 are to the effect that the verdict of the jury is contrary to law and the weight of evidence. At the time of trial it was shown that the defendant paid police officers monthly the sum of $25.00 for

protection in the operation of an illegal "numbers business." These contentions were not argued, and it will be sufficient at this time to say in our opinion there was more than sufficient evidence to sustain defendant's guilt beyond a reasonable doubt.

The third contention is that the jury's minds were unduly influenced by bias and prejudice created by inflammatory articles in newspapers of general and local circulation. This contention was specifically raised on a motion for continuance of the case, and the Supreme Court of Pennsylvania directed that three weeks delay be had in the trials of this and many similar cases against Erie residents charged with bribery of public officials. It is to be expected that certain charges of corruption in the police department due to bribery will cause widespread interest in the public and be the subject of considerable newspaper publicity. However, that in itself is not ground for a new trial. On many of these cases counsel for defendants requested a voir dire examination of the jury, and the jurors called stated they would try each case on its merits regardless of any such publicity. We are satisfied that the evidence was sufficient to convict the defendant and that the verdict was entirely proper.

Contention number four restates contentions number two and three, and in our opinion has no merit. The fifth contention is that the court should have sustained defendant's demurrer, but in our opinion the matter was clearly for the jury. For the same reason we hold appellant's sixth contention to be without merit. The seventh contention is that the court erred in not affirming specifically defendant's points one to thirteen inclusive. These points

were in most instances correct in the subject matter contained but had been fully covered by the court in its general charge, and for that reason repetition was unnecessary.

The additional reasons, one and two, are vague and incomplete. To our recollection Officer Camilli was in the courtroom during a portion of the trial and, if not called by the Commonwealth, was available to the defendant. The defendant does not set forth anything with regard to Henry Soscia which was irregular or contrary to law.

We find nothing in the motion for new trial which will support defendant's position with regard thereto.

In support of the motion for arrest of judgment, allegations are made that the proceedings before the grand jury were irregular and improper. The allegation as to the District Attorney was not supported by any evidence and was abandoned at the time of argument. In support of the charge as to actions of the Assistant District Attorney a petition to quash was filed alleging that he had used undue influence and coercion before the grand jury at the time the indictment against the defendant was secured. We granted a hearing and took testimony on this point. It is extremely doubtful that we were correct under the allegations made as above noted without further detail in permitting a disclosure of the events which took place in the grand jury room. Sometimes it is proper. Commonwealth vs. Judge Smart, 368 Pa. 630. However, it has been held, "A court should not sustain a motion to quash, based upon allegations of extraneous factors, except in a clear case where it is convinced that harm has been done to the defendant by improper conduct that interfered with his

substantial rights." Commonwealth vs. Kilgallen, 175 Pa. Superior Ct. 52, at page 60. Having taken this testimony, however, we must now conclude that nothing detrimental to the defendant's interests took place in the grand jury room. One of the grand jurors noticed a bulge in the pocket of Assistant District Attorney Johnson indicating the presence of a gun; and when she asked concerning that fact, Johnson replied that he woud feel naked without it, around these boys. The District Attorney argued that he referred to the large group of people in the hallways during the time these many charges of bribery against many defendants were being considered, but we must view the matter as if the grand juror assumed that the defendants were intended. It is not contended that anything further developed or that more than two or three of the grand jurors knew of the occurrence. In any event there was nothing shown from which it might be even inferred that any influence or coercion was intended or attempted.

The second contention is that the transcripts from the magistrate's office upon which the indictments were obtained were altered by direction of the District Attorney. The testimony relied upon to sustain this contention was taken in the cases of Commonwealth vs. Laborio Arnone, one of the persons charged with paying bribes. These cases were entered at numbers 156 through 161 November Sessions, 1954, and were adopted by reference for his own use by this defendant. In order to understand why the testimony relied on by this defendant was adopted from the Arnon cases, we should note that upwards of two hundred indictments against more than twenty men charged with giving and receiving bribes in order to in-

fluence the mayor and other officials in the police department in protecting the givers of the bribes in the numbers racket were prepared and filed after a series of hearings before the committing magistrate, Joseph E. Cresciman. Subsequently when one attorney representing one or more of the defendants filed a motion for continuance, the others all filed similar motions, and they were argued together. This also happened when the motion to quash based on the contended irregularities before the grand jury was presented. Applicable to the situation here, the motions to quash based on the magistrate's return to the "next term" and filed in the Arnone cases were adopted by other lawyers with similar motions, who in the record stated the testimony there taken would be applicable to all.

An examination of the testimony of the magistrate and his secretary in the Arnone cases, however, shows that the complaint here made was not equally applicable to all. The magistrate conducted a series of hearings beginning October 25, 1954, and returned the transcripts of those hearings in "batches", and inasmuch as the trials were to be held the following month, the alderman presumed and noted that the defendants in the first "batch" were held to the next term of court. In this group were involved Joseph Luciano, John Koehler, Lyle Keene, Mike Dominic, and Anthony Ciotti, and Carl Alessi. Some of these men were discharged for lack of evidence, and the others were either tried and convicted or pleaded guilty. None of these men appealed. The magistrate testified that after he was told by the District Attorney that these cases were to be returned to the November term of court he corrected the original "batch" and all of the remain-

ing defendants were bound over to the November term. Mr. Cresciman's secretary, Laurel Crowley, testified that those corrections in the first "batch" were made on Tuesday or Wednesday; i.e. October 25 or 26. The hearing of this defendant was had before the magistrate 6 days later; that is, Monday, November 1st, 1954; and although on that transcript the magistrate made the alteration from the next term to November term with a pen, it was merely a correction made by him prior to his sending the transcript to the District Attorney. This appears not only from the record in the Arnone case but also from the fact that the defendant signed his appearance bond to the November Term of Quarter Sessions Court.

It is proper to return a transcript to the same term of court for which the grand jury is in session. Commonwealth vs. Gallo, 70 Pa. Superior Ct. 548. Commonwealth vs. Magid, 91 Pa. Superior Ct. 513. It is sometimes proper to base proceedings to quash an indictment on matters not apparent on its face; but when that method is used, the burden is upon the defendant to present facts in support of the position taken. This was not done. Commonwealth vs. Haines, 57 Pa. Superior Ct. 616.

The third contention is that the indictments specifically charged that the crime had been committed by "force and violence." These words are on the printed form of the indictment and were mere surplusage in this case. The charge is sufficient if the payment of money and the illegal purposes are set forth as they were here.

The fourth contention is that the defendant was convicted of an offense of which he could not be convicted under the indictments. This point was not argued, and we

are unable to ascertain any reason therefor. We therefore hold it to be without merit.

The fifth contention is in effect a repetition of contention number 2 and concerning which further discussion will be unnecessary.

We conclude, therefore that all of the assignments of error herein discussed have no substance in law or fact.

EVANS, *P.J.*

Filed March 25, 1955.

VI.

OPINION OF THE SUPERIOR COURT

In The Superior Court of Pennsylvania

Nos. 68, 79, 80, April Term, 1955

Appeals from Judgments of the Court of Quarter Sessions of Erie County, at Nos. 400, 401, 402, November Sessions, 1954.

OPINION

Filed: July 21, 1955

By Rhodes, P. J.:

These appeals by defendant are from conviction and sentences on charges of bribery brought under the penal provisions of the Third Class City Law of June 23, 1931, P.L. 932, Art. IX, § 911, as amended by the Act of June 28, 1951, P.L. 662, § 9, 53 PS § 12198—911. The prosecution arose out of an investigation by the District Attorney of Erie County into alleged bribery of city officials and employes of the City of Erie in connection with gambling or the operation of the "numbers racket" in that city. See Com. v. Schwartz, 178 Pa. Superior Ct. 434, 115 A. 2d 826. Defendant was tried before a jury and found guilty.

Appellant, in his own behalf, testified at length that the payments on July 1st, August 19th, and September 28th were made as political campaign contributions. Appellant testified further that, in the early part of September, 1954, he gave Verga $100, but that it was for a ticket to a political dinner, though he never obtained a ticket or a receipt. Such payment was denied by Verga. Appellant's clerk corroborated appellant as to the payment of $100 and as to $20 paid in August for tickets to a political affair.

Commonwealth's witness Verga explained that the amounts retained by him and turned over to the assistant district attorney from the payments of $25 each on July 1st and August 10th were less than half because of his inability to make the correct change; and that from a similar payment on September 28th to Camilli he received a ten dollar bill together with $2.50 from Camilli himself to make an equal division.

Appellant now asserts that the telephone conversations were inadmissible as to the bribery charges although they might have been admissible in connection with the conspiracy charge. No objection, specific or general, was made to the admission of this evidence. See Com. v. Markwich, 178 Pa. Superior Ct. 169, 172, 113 A. 2d 323. Moreover, this reason was not incorporated in the motion for a new trial. There is absolutely no basis for appellant's argument on this item of evidence, as his counsel, at the time the records were offered, said: "Would the Court note that we are not filing or presenting any objection to this evidence?"

There was ample evidence presented by the Commonwealth from which it could be found that appellant was

guilty of bribery under the statute. At least three periodic payments of $25 each to the police officers were admitted. There was testimony showing gambling on appellant's premises. The witness Verga tetified that he saw a bet taken in appellant's store by his clerk; and that he observed a bet placed over the counter. The monitored telephone conversations tended to establish that appellant, as instigator, made these payments to the police covering specific periods of time. If the Commonwealth's evidence is credited, the inference is reasonable that these payments were made to influence the police and receive protection against the enforcement of the gambling laws. Appellant's contention that the payments were for political purposes and not for protection presented a factual issue for determination by a jury. In this connection the jury could consider whether the payments were political contributions properly made to police officers on duty. Appellant cites and relies upon Com. v. Bausewine, 354 Pa. 35, 46 A. 2d 491, in support of his argument that the evidence was insufficient to sustain his convictions for bribery. The Bausewine case is not controlling. There the alleged bribery payments to a police officer were strongly denied, and the Commonwealth's chief witness was considered an uncertain and unreliable witness. The evidence presented by the Commonwealth was circumstantial and insufficient, as the court held, to justify an inference of the guilt of the accused. In the present case the payments were admittedly made and the "reasonable inference of guilt" of appellant was "based on facts and conditions proved." It was for the jury to determine the purpose for which the payments were made by appellant, and appraise appellant's testimony as to plausibility.

Appellant contends that the trial judge in his charge materially misstated the testimony of Officer Verga, and that this amounted to fundamental error requiring a new trial. The portion of the charge of which complaint is made reads as follows: "He (Officer Verga) said on June 30, 1954, he went into the newsroom at 22 West 12th Street owned by this defendant, and he talked to him generally about the vice squad and the weather *and other things.*" (Italics supplied.) Appellant argues that the words "and other things" are a material misquotation of Verga's testimony, and that these words might have been interpreted by the jury as meaning that appellant directly offered Verga a bribe. The reference of the trial judge to Verga's testimony was substantially correct. On cross-examination Verga said of this incident: "There was a talk about how long I was going to be on the vice squad, general conversation of the weather I imagine, and come back and see him the next day, which I did." In context the words "and other things" carry no necessary inference or even suggestion that bribery as such was discussed. There was no misquotation of the testimony, nor was there any prejudicial error in the trial judge's instruction. Appellant took only a general exception to the charge, and, under the circumstances, the convictions will not be reversed in the absence of basic or fundamental error. Com. v. Eberhardt, 164 Pa. Superior Ct. 591, 604, 67 A. 2d 613.

The trial judge submitted to the jury only such evidence as was relevant. At the beginning of his charge the trial judge withdrew from the jury's consideration the conspiracy indictment, and submitted only the bribery charges relating to the three payments by appellant on July 1, August 19, and September 28, 1954. The trial judge, at

least in substance, also withdrew from the jury's consideration the payments of July 20th and October 15th. At the same time he instructed the jury: ". . . there are only three items of cash which are offered in connection with the three specific charges before you." There is obviously no merit in appellant's argument that this instruction did not amount to withdrawal of the payments of July 20th and October 15th from consideration by the jury.

These alleged errors in the charge of the court are now presented for the first time; they were not raised or argued in the court below in support of the motion for a new trial. Therefore the court below could not be charged with error in refusing to grant a new trial for a reason which was not presented to it. We have held that contentions relating to such matters which were not raised or considered in the court below cannot be invoked on appeal unless there has been some basic or fundamental error seriously affecting the merits of the case and imperatively calling for reversal. Com. v. Schultz, 170 Pa. Superior Ct. 504, 512, 87 A. 2d 69; Com. v. Robinson, 148 Pa. Superior Ct. 61, 70, 24 A. 2d 694. In the present case there was no basic or fundamental error in the charge of the court which was fair and adequate.

Appellant raises the alleged misconduct of Assistant District Attorney Johnson before the grand jury as prejudicial. The point as to the assistant district attorney's carrying a gun concealed in his hip pocket was first raised in the court below on appellant's motion to quash the indictment. The evidence taken relative to events transpiring before the grand jury in this connection is identical with that taken on a similar motion in Com. v. Schwartz,

supra, 178 Pa. Superior Ct. 434, 115 A. 2d 826, since all defendants who had filed motions to quash the indictments adopted the same testimony taken in the court below on the motions to quash. It was not established that the alleged conduct of the assistant district attorney was prejudicial to appellant. Moreover, disposition of the matter was primarily within the discretion of the trial court. Our ruling in Com. v. Schwartz, supra, 178 Pa. Superior Ct. 434, 115 A. 2d 826, is controlling here. Further, the evidence taken on the motions to quash the indictments does not sustain appellant's contention in his case that Assistant District Attorney Johnson acted in the dual capacity of witness and prosecutor before the grand jury to the prejudice of appellant.

The evidence fully warrants the jury's verdicts, and sustains the conviction of appellant on the respective indictments. Appellant has not shown any reversible error in his trial or in the disposition by the court below of his motions in arrest of judgment and for a new trial.

Judgments of sentence are affirmed, and it is ordered that defendant appear in the court below at such time as he may be there called and that he be by that court committed until he has complied with his sentence, or any part of it which had not been performed at the time the appeal was made a supersedeas.

VII.

OPINION OF THE SUPERIOR COURT (COMPANION CASE)

In The Superior Court of Pennsylvania

No. 67 April Term, 1955

COMMONWEALTH OF PENNSYLVANIA

v.

STANLEY M. SCHWARTZ,

Appellant

Appeal from Judgment and Sentence of Court of Quarter Sessions of Erie County, at No. 309, November Sessions, 1954.

OPINION

Filed: July 21, 1955

By Rhodes, P. J.

This is an appeal by defendant from conviction and sentence on a charge of bribery brought under the penal provisions of the Third Class City Law of June 23, 1931,

P. L. 932, Art. IX, §911, as amended by the Act of June 28, 1951, P. L. 662, §9, 53 PS §12198—911.

The charge grew out of an extensive investigation by the District Attorney of Erie County into alleged bribery of officials and employes of the City of Erie in connection with gambling or the operation of the "numbers racket" in that city. The inquiry resulted in indictments against about forty persons, twelve of whom were tried and convicted, while eighteen pleaded guilty.

The bill of indictment at No. 309, November Sessions, 1954, in the Court of Quarter Sessions of Erie County, charged Stanley M. Schwartz, the appellant, with giving money, to wit, $500, to Thomas W. Flatley, Mayor of the City of Erie, to influence him in the performance or nonperformance of his official duties as mayor by willfully failing to enforce the laws of the Commonwealth pertaining to gambling. The jury returned a verdict of guilty against appellant, and his motions for new trial and in arrest of judgment were refused by the court below. On appeal to this Court, appellant alleges the court below erred in refusing the grant his motions. We shall consider the numerous contentions presented.

Appellant's assertion that the evidence is not sufficient to sustain the conviction is devoid of merit as a brief review of the evidence discloses. The first witness called by the Commonwealth was Jack Martin, formerly a police inspector of the City of Erie, who had also been indicted for bribery and had pleaded guilty. Martin told of a meeting in Mayor Flatley's office on or about April 10, 1954, at which appellant and the mayor were present. It was there agreed that Martin should see certain gamblers or

"numbers men" and collect money from them. These collections had formerly been made by one Henry Soscia, who had been dropped as collector because of difficulties with the police. Martin named the gamblers from whom he collected and also those who paid money to appellant. For nearly a year Martin, the mayor, and appellant met once a month often in the mayor's office. They equally divided the money collected, after paying $250 a month to Soscia to keep him quiet. About $1,500 was collected each month by Martin and appellant. Martin also testified to the arrest of certain gamblers who had been making protection payments, and that he was thereupon called by Mayor Flatley and directed to go to appellant's home, where appellant warned him not to make any more such arrests if he wanted to retain his job. An operator of a cigar store and a "numbers man" in the City of Erie testified he paid appellant $250 a month from May through October, 1954, for no reason other than appellant asked this witness for "political funds."

Following their arrests appellant and Mayor Flatley made written statements or confessions which were read into evidence at appellant's trial. In his signed statement appellant gave detailed accounts of meetings with the mayor, Martin, and Soscia at which it was agreed that money should be collected from men in the "numbers business" or lottery, including the amounts to be collected by appellant, Martin, and Soscia from the various "numbers men" named. Appellant therein said that the period when the collections were made by them covered approximately a year and four months, ending with September, 1954; and that the money was divided, usually in the mayor's office, being put into three envelopes, averaging $500 each.

In his confession Mayor Flatley admitted receiving about $500 a month from appellant and Martin; and that the division sometimes took place in the mayor's office. Flatley stated he suspected the moneys came from persons in the "numbers game," though he denied receiving any money directly from gamblers. The Flatley confession was taken in the presence of appellant who made suggestions as to what it should contain. Assistant District Attorney Johnson testified that just prior to the time Flatley made his written confession appellant entered the room, and, in the presence of prosecuting officials said to Mayor Flatley: "Tom, they know all about it. You might as well tell them." Appellant took the stand in his own behalf. He testified that he was a close friend of Mayor Flatley; that he was active in Flatley's political campaigns; and that, while admitting receipt of moneys from business men and payments to the mayor, these funds were collected and distributed solely as political contributions without any intent to bribe this city official.

The evidence presented a factual issue for the jury to decide as to whether appellant was guilty of bribery under the statute or whether the funds collected and distributed were given by appellant to Flatley for a lawful purpose.

Appellant claims he was not guilty of bribery as defined in section 911 of the Third Class City Law, as amended, 53 PS §12198—911, even if the Commonwealth's evidence is believed. The section of the law here involved, 53 PS §12198—911, provides: "Any person who shall, directly or indirectly, offer, give, or promise any money or anything of value, testimonial, privilege, or personal ad-

vantage to any member of council or other city officer or employe, to influence him in the performance or nonperformance of any of his public or official duties, shall be guilty of bribery, . . ." Appellant contends this act does not cover the present situation, where a defendant gives or delivers money collected from others to a city official to influence him, but that the act only strikes "at the original giver or source of the bribe." Appellant makes reference to the bribery section of the Penal Code of June 24, 1939, P. L. 872, §303, 18 PS §4303, which prohibits "delivery" of any money in order to influence the official action of any officer of the Commonwealth, and argues that the Third Class City Law here involved is not so inclusive. Although penal statutes must be strictly construed, it is clear that the acts of appellant came squarely within the provisions of the statute under which he was indicted. It covers a situation where a person shall "directly or indirectly, offer, give, . . . any money . . . to any . . . city officer or employe, to influence him in the performance or nonperformance of any of his public or official duties, . . ." The fact that appellant, as the giver of the money, was not the "original source" of the bribe is not material. Appellant was shown to have possession of cash funds which he gave to the city official to influence him in the performance or nonperformance of his duties. On such evidence, if credited, appellant clearly violated the provision of the Third Class City Law, relating to bribery of city officials.

Appellant asserts he was deprived of his constitutional guarantee of a fair trial by reason of a hostile atmosphere created by unfavorable publicity in local newspapers, television, and radio, and that the court below erred in

refusing a new trial as requested. Appellant filed a motion for continuance, prior to trial, on this ground, and the court below held a hearing on November 11, 1954, at which evidence of newspaper articles, television and radio broadcasts concerning these criminal proceedings was presented at length. After hearing, the court in banc refused appellant's motion for a continuance. Appellant also filed a motion for change of venue, which also was refused by the court below. Appeals from the lower court's refusal to grant a continuance or a change of venue were taken to the Supreme Court of Pennsylvania. On November 15, 1954, the Supreme Court, by its order, denied a general continuance and authorized the district attorney to list the trials for the week of November 29, 1954. The petition for a change of venue, which the district attorney now says he did not oppose, was also refused by the Supreme Court. In refusing a continuance because of alleged unfavorable publicity, the court below stated: "Unquestionably, the public generally knows that what has been termed 'a public scandal' will come to trial in this court to have determined whether or not those charged as participating therein are guilty or innocent. There is no testimony before us to show that the public generally is aroused, prejudiced or incensed in such a way as to deprive any of those under indictment with a fair trial. We do not condone the pretrial of cases in newspapers or any means or any processes through which information is disseminated with reference thereto, but an examination of approximately forty exhibits showing newspaper publicity involved and a transcript of the testimony given at preliminary hearings which was taken on tape recorder and broadcast via radio and television, shows what took place was factually re-

ported. . . ." Undoubtedly there was widespread local publicity given to criminal proceedings of this nature involving prominent persons. The court found that there was no showing the publicity was prejudicial, and that appellant would not be deprived of a fair trial. The Supreme Court refused a general continuance which was sought on this ground. A second motion for continuance was filed before trial on November 29, 1954, reiterating the alleged prejudice as a result of unfavorable publicity; this petition was likewise refused. The refusal to grant a new trial because of unfavorable publicity in the press and news media is within the sound discretion of the trial court. Com. v. Grotefend and Haun, 85 Pa. Superior Ct. 7, 13; Com. v. Harrison, 137 Pa. Superior Ct. 279, 8 A. 2d 733; Com. v. Valverdi, 218 Pa. 7, 66 A. 877; Com. v. Deni, 317 Pa. 289, 176 A. 919. The record here on appeal does not show that the jurors were prejudiced or that appellant was deprived of a fair trial. There is nothing to indicate that local newspaper reports prejudiced the trial in any way. The trial judge did not abuse his discretion in refusing a further continuance or in refusing a new trial because of alleged unfavorable publicity. See Com. v. Schultz, 170 Pa. Superior Ct. 504, 512, 87 A. 2d 69.

Appellant filed motions to quash the indictment on the ground, inter alia, that the conduct of the district attorney and assistant district attorney before the grand jury was prejudicial to appellant. The court granted a rule and heard testimony on the motion to quash. It was alleged that Assistant District Attorney Johnson, though not sworn as a witness, prompted and corrected a witness,

Officer Verga, as to names and dates of the payment of bribery money. Further, appellant alleged, and the testimony taken showed, that some of the grand jurors observed a bulge in the hip pocket of Assistant District Attorney Johnson. Upon inquiry by a grand juror as to why Assistant District Attorney Johnson was wearing a gun, he is supposed to have replied that he would "feel naked without it." Mr. Johnson admitted testifying as a witness to the extent of reading the statements of Mayor Flatley and the appellant to the grand jury, but he denied acting in the dual capacity of witness and prosecutor. Mr. Johnson also denied prompting the witness Verga, though he did not deny the alleged conversation with the grand juror relative to carrying a gun concealed in his hip pocket. A majority of the court below refused the motion to quash the indictment. The general rule of secrecy surrounding grand jury proceedings is subject to some exceptions, but an investigation of the conduct of the prosecuting officer before the grand jury should not be instituted except on a clear showing of irregularity. Com. v. Smart, 368 Pa. 630, 636, 84 A. 2d 782. "The function of the prosecuting officer is to attend on the grand jurors with regard to matters on which they are to pass, to aid in the examination of witnesses, and to give such general instructions as they may require, but he must not attempt to influence their action nor indeed should he be present while they are deliberating on the evidence or voting on a matter under investigation: Commonwealth v. Bradney, 126 Pa. 199, 205, 17 A. 600, 601; Commonwealth v. Brownmiller, 141 Pa. Superior Ct. 107, 113, 14 A. 2d 907, 910": Com. v. Smart, supra, 368 Pa. 630, 634, footnote 3, 84 A. 2d 782, 785.

Appellant's claim that the assistant district attorney acted irregularly and created prejudice by testifying in person and by prompting witnesses, being strongly denied, is not definitely established and the action of the court below in refusing to quash the indictment on this ground must be sustained. In our opinion appellant has not shown that the conduct of the assistant district attorney before the grand jury relative to carrying a gun was such as to establish prejudice or invalidate the indictment. It does not appear that the grand jurors generally were aware of the gun incident. In view of the nature of grand jury proceedings, prejudice may not be inferred but must be definitely established. "A court should not sustain a motion to quash, based upon allegations of extraneous factors, 'except in a clear case where it is convinced that harm has been done to the defendant by improper conduct that interfered with his substantial rights': Com. v. Brownmiller, 141 Pa. Superior Ct. 107, 116, 14 A. 2d 907, citing Com. v. Haines, 57 Pa. Superior Ct. 616, and Com. v. Viscount, 118 Pa. Superior Ct. 595, 179 A. 858": Com. v. Gross, 172 Pa. Superior Ct. 85, 92, 92 A. 2d 251, 254. See, also, Com. v. Poley, 173 Pa. Superior Ct. 331, 336, 98 A. 2d 766; Com. v. Kilgallen, 175 Pa. Superior Ct. 52, 60, 103 A. 2d 183, reversed on other grounds, 379 Pa. 315, 330, 108 A. 2d 780.

Appellant proceeded to trial on December 8, 1954, with his codefendants, Mayor Thomas W. Flatley and Henry Soscia. These codefendants entered pleas of guilty which were accepted by the court. The jury had not been chosen in appellant's case, and he claims that the acceptance of guilty pleas of the codefendants in open court, in the presence of the panel of prospective jurors, was preju-

dicial and deprived appellant of a fair trial. After the jury was sworn, counsel for appellant moved to continue the case for this reason. There is nothing to indicate that the panel was aware of the entry of the guilty pleas by the codefendants, nor was prejudice, bias, or improper influence upon the part of any member of the jury in appellant's case established. See Com. v. Chavis, 357 Pa. 158, 168, 169, 53 A. 2d 96. Granting or refusing a motion for continuance or for a new trial based upon an allegation that the jury heard matter prejudicial to a defendant is largely within the discretion of the trial judge. Com. v. Spallone (No. 1), 154 Pa. Superior Ct. 282, 35 A. 2d 727. In the present case the voir dire examination of the jurors disclosed that none of the seventeen jurors questioned had formed an opinion as to the guilt or innocence of appellant.

The written statements or confessions of appellant and Mayor Flatley, taken prior to trial, were introduced into evidence, over appellant's objection, and read to the jury. Appellant complains that at the close of the trial both statements were sent out with the jury as exhibits. The record does not show that the statements were sent out, or that counsel for appellant made any objection if this occurred. The point was not raised in the court below. It is settled by a long line of authorities that it is in the discretion of the trial judge as to what papers, properly admitted in evidence, shall go out with the jury. Com. v. Clark, 123 Pa. Superior Ct. 277, 290, 187 A. 237; Quartz v. Pittsburgh, 340 Pa. 277, 279, 16 A. 2d 400. However, exhibits which are nothing more than depositions and transcripts of oral testimony given at the trial should not be sent out. Com. v. Clark, supra, 123 Pa. Superior

Ct. 277, 290, 187 A. 237; Zank v. West Penn Power Company, 169 Pa. Superior Ct. 164, 167, 82 A. 2d 554. Confessions of an accomplice, admitted in evidence at trial, may be sent out with the jury, over defendant's objection, where the court cautions the jury not to give such confessions undue weight. Com. v. Murphy, 92 Pa. Superior Ct. 139. In this respect confessions or admissions are to be distinguished from depositions or transcripts of oral testimony. Brenner v. Lesher, 332 Pa. 522, 528, 2 A. 2d 731. In the present case, as stated, the record does not show that the confessions were sent out with the jury as exhibits. Even if they were, appellant did not object or raise the point below. Prejudice may not be presumed and appellant has not shown that he was entitled to a new trial for this alleged reason.

Appellant states the next question as follows: Was the appellant tried at a term of court which was improper and which was not the term to which he had been originally committed by the committing magistrate? Appellant assumes that the magistrate originally, on October 25, 1954, returned appellant's case to the "next term of Court," which would have been the February term; that the magistrate later amended his return to read "the November Term" of court. Testimony on this matter was taken in the court below on the motion to quash the indictment. A careful reading of this testimony does not substantiate appellant's contention. The bond signed by appellant was returnable to the second Monday in November, 1954. At most, the testimony was conflicting as to whether the magistrate amended his return from the "next" to the "November Term" of court then in session. A committing magistrate may bind over a defendant and make return

of the proceedings to a term of court then pending; such action is not ground for quashing the indictment; furthermore, the entry of bail by appellant was a waiver of the error, if any. Com. v. Magid, 91 Pa. Superior Ct. 513, 515, 516; Com. v. Gross, supra, 172 Pa. Superior Ct. 85, 92, 92 A. 2d 251; Com. v. Poley, supra, 173 Pa. Superior Ct. 331, 336, 98 A. 2d 766.

There remains the question as to the disqualification of the trial judge. About six months preceding the trial the district attorney and an assistant approached President Judge Evans, and informed him in a general way that the district attorney's office was making an investigation into charges of widespread bribery in the City of Erie. The district attorney told the judge that the investigation might entail acceptance of marked money given as a bribe, and that the district attorney considered, for the district attorney's own protection, the judge should know this fact. The district attorney furnished the judge with several written reports showing payments of money on various dates to different individuals. President Judge Evans, the trial judge, stated at a hearing on the motion for continuance that he never read these reports closely, and that he knew nothing beyond the broad fact that an investigation into alleged bribery was in progress. The judge's knowledge of the investigation preceding the trial was therefore indirect and remote. He disclosed fully the limited extent of his information, and his explanation shows no semblance of prejudice, bias, or adverse interest. A trial judge is not disqualified merely because he has some previous acquaintance with the case. Com. v. Musto, 348 Pa. 300, 304, 35 A. 2d 307; Brown v. Bahl, 111 Pa. Superior Ct. 598, 602, 170 A. 346, 348. There was no

reason for the trial judge to disqualify himself; appellant did not establish any bias or prejudice, upon the part of the trial judge, which would entitle him to a new trial. Cf. Com. v. Nelson, 377 Pa. 58, 104 A. 2d 133; Levine Contempt Case, 372 Pa. 612, 618, 95 A. 2d 222.

This case was well and fairly tried. The matters raised on this appeal, separately or collectively, do not require a reversal of the judgment of sentence. The evidence warrants the jury's verdict of guilty. In fact, it would be difficult to justify any other verdict than that reached.

The judgment of sentence is affirmed, and it is ordered that defendant appear in the court below at such time as he may be there called and that he be by that court committed until he has complied with his sentence, or any part of it which had not been performed at the time the appeal was made a supersedeas.

VIII.

PETITION FOR APPEAL

In the Supreme Court of Pennsylvania

Western District

Miscellaneous Docket No. 2034A

Commonwealth of Pennsylvania

vs.

Anthony Tonty,

Appellant

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

The Petition of Anthony Tonty respectfully represents:

1. That he is the appellant in the above case which originated in the Court of Quarter Sessions of Erie County, Pennsylvania, at Nos. 400, 401, 402 November Sessions 1954, from which court appeals were taken to the Supe-

rior Court of Pennsylvania at Nos. 68, 79 and 80, April Term, 1955.

2. That on July 21, 1955 the Superior Court affirmed judgments of conviction as to the aforesaid petitioner.

3. That the conviction of your petitioner was based upon indictments charging him with the crime of conspiracy to bribe a police officer or officers of the City of Erie, also with offering bribes to Edward Camilli and Russell Verga, police officers, to influence them in the performance and non-performance of their official duties by wilfully failing to perform the laws of the Commonwealth of Pennsylvania pertaining to gambling in violation of the Act of June 28, 1951, P. L. 622, Section 9, 53 P.S. Section 12198-911, being part of the third class city law of 1931, as amended. At the close of the trial the charge of conspiracy was withdrawn from the consideration of the jury and the case submitted to them on three charges of bribery.

4. The petitioner was sentenced in the indictment at No. 400 November Sessions 1954, by the Honorable Elmer L. Evans, P. J. who presided at the trial, to pay a fine of $500.00 to the Commonwealth, pay the costs of prosecution, and undergo imprisonment in the Allegheny County Workhouse for an indefinite term, the minimum of which should be one year and the maximum two years, to be computed from the date of commitment to-wit, January 6, 1955. He was also sentenced in the indictments at Nos. 401 and 402 to a similar fine and term of imprisonment, to run concurrently with that at No. 400. Petitioner was not committed to jail but was admitted to bail.

5. The questions involved in the appeals before the Superior Court are as follows:

1. Did the Court below err in refusing to quash the indictments because of the prejudicial action of the Assistant District Attorney:

(a) In going into the Grand Jury Room with a gun in his hip pocket and stating to one juror in the presence of all that if he did not have it (gun) he would feel naked if he should run into one of the boys, meaning the defendants?

(b) In acting in the dual capacity of assistant district attorney and witness, sworn and unsworn?

2. Did the trial judge commit error in the Charge where there was a substantial variance between the testimony of the chief prosecution witness as to an alleged conversation with defendant bearing on intent, and the account given thereof by the trial judge?

3. Did the trial judge commit error in not excluding from the consideration of the jury, a payment of October 15, not relevant to the bribery charge, conspiracy having been withdrawn?

4. Did the Court below err in refusing Motion for New Trial because (a) verdict was contrary to the law; (b) was against the evidence and weight of the evidence?

5. Did the Court below err in overruling defendant's Motion in Arrest of Judgment?

6. Did the Court below err in overruling defendant's demurrer to the evidence?

The facts and contentions of the parties as developed on the trial may be stated briefly as follows:

6. Anthony Tonty, also referred to as Arch Tonty, was the proprietor of the Esquire News, a place of business located at 22 West 12th Street in the City of Erie. The Commonwealth produced as its witness one Russell Verga, who testified that he was a patrolman on the Erie police department and from May 1, 1954 on he was assigned to the Erie vice squad; that on June 30, 1954 he saw defendant in the Esquire News and had a conversation with him in which he said that if possible Verga should come back and see him the next day; that there was a clerk present in the Esquire News and that he observed the clerk writing down a number and taking a horse bet (163a). On the next day this witness stated that he received $25.00 from Tonty but that there was no conversation relative to this payment (164a); he said that half of this $25.00 went to officer Camilli and the other half he turned over to Assistant District Attorney Herbert Johnson; that on August 13, 1954 he had a conversation with this defendant which was monitored by the said Assistant District Attorney stating that Tonty told him to come and see him next week; that on August 19, 1954, the witness saw Tonty in the Spa Cafe at 12th and State Streets, and that Tonty paid him $25.00 in Camilli's presence (166a); that on August 20, 1954 he had a telephone conversation with Tonty which also was monitored by the said Assistant District Attorney, and that it was in reference to Tonty paying money, namely that the conversation was that the payment for August 19 included the month of August, that it was not for vacation pay (168a); Verga further testified that he saw the defendant on September

28, 1954 in the Esquire News and that officer Camilli was present; the $25.00 was passed to Camilli in the presence of the witness of which the witness received $12.50 (169a).

7. At side bar the Commonwealth offered to prove a payment on October 15 as an overt act going to proof of the conspiracy. The objection to this offer was that defendant was not charged with offering or giving any bribe on that particular date; that this evidence was not included in the several indictments, etc.; the Court overruled the objection and noted an exception, stating that any overt act to prove a conspiracy may be admitted even though a specific charge based on that act has not been made. The witness then testified that on October 15, 1954 he saw Arch Tonty at the Esquire News and $25.00 was paid to him by being placed in between a second edition of the Erie Times; that $15.00 was given to Officer Camilli and the witness kept $10.00; that when Officer Camilli was apprehended on October 16 he had this marked money on him (170a). Officer Camilli was a member of the vice squad of the Erie police force from May 1 until his arrest on October 16.

8. On cross examination, Verga testified that prior to June 30, 1954 he had seen Tonty two or three times in a week in a restaurant or in the vicinity of the Esquire News (173a).

9. Verga testified that he had never solicited the defendant for political purposes; he stated he was on orders from Inspector Martin to go and see these fellows (197a-198a); that he did not recall receiving $20.00 for a contribution for the Democratic dinner, nor receiving $100.00 from Tonty when he went over to his place of business

and requested that he give $100.00 for political reasons for the Democratic party in Harrisburg; he also denied that Tonty told him on June 30 that he had been contributing every year for political purposes, and that he had given the Democratic or Republican party as much as $200 in a year; he also denied asking why Tonty did not give him some, and denied telling Tonty that he was interested in the campaign of Mr. Juilante or Mr. Cannavino (201a). After a recess in the trial this witness resumed the stand and changed his testimony relative to the Democratic dinner and the tickets, stating that on October 6 he received orders from Inspector Martin to solicit two $10.00 tickets for the Democratic party which was being held for Governor Leader; that he solicited this on October 6 but denied that any money was received from Tonty for the $100 Democratic dinner; he admitted that he was collecting for the Democratic dinner by orders of Inspector Martin (202a).

10. The defendant opened his case by trying to call to the stand Edward Camilli for the purpose of showing that Camilli did not conspire with Tonty and also to show that at no time did he, Camilli, notice any evidence of gambling on the premises of the store owned and controlled by the defendant (223a). Mr. Camilli was not present in the courtroom, and so another witness was called, namely Anthony Bucceri, the clerk employed in Tonty's store.

11. Anthony Bucceri testified that Verga, whom he had known all his life, came into the store quite frequently; sometimes he would ask for the boss, that is Archie Tonty and that the witness talked with him a couple of times

(224a-225a); that during August 1954 Verga called up the store and the witness answered the phone and the conversation was about two tickets for the Democratic party, Verga merely asked if the $20.00 was there saying he had to collect the money for it. Verga got the $20.00 for the tickets although the witness never saw any tickets (225a-226a). On another occasion this witness saw Tonty give Verga $100.00 which he stated was for a Democratic dinner down in Washington or Harrisburg; this was about the first of September; this witness denied that he was marking down numbers or doing something with horses names or anything like that in Tonty's place of business; he denied that he ever took bets on horses or placed numbers, or sold numbers in the operation known as gambling; and he was positive there was no gambling going on in this store during the entire time he was employed there (226a-227a). On cross examination he testified that in this store they sold cigars, cigarettes, newspapers, magazines and ice cream; that he personally gave Verga the $20.00 for the Democratic dinner and that he saw Tonty give him $100.00 for the big dinner, but denied seeing any other money pass at any other time (228a-229a).

12. Anthony Tonty, the defendant, took the witness stand and testified that he is married and has three children, and that he has been in business in the store known as Esquire Cigar Store, six or seven years (230a). He said that in the latter part of June or the early part of July 1954, Verga came into his store and asked to talk with him, he said he would like a little donation. When the witness told him he had no reason to give him any money Verga reminded him that he had made donations to the Democratic party before. Tonty admitted that he

had, and also the Republican party. Verga then called a friend, John Messelo, who he knew had made contributions to the Democratic party on several occasions and also talked with one Henry Soscia to whom he had been referred by Messelo (230a-233a). He was not permitted to give the substance of either conversation, it being ruled hearsay. The next day Verga came in and the defendant handed him $20.00 and at the request of Verga gave him $5.00 more. Defendant stated it was a donation to the Democratic party and that there was not such conversation, just "hello and goodbye" (234a). Tonty further testified that about August 19, he went to the Spa Cafe and had lunch there and that Verga was sitting at a table and he asked him if he could not contribute some more, and when the witness asked him what it was for, Verga said it was for the same thing, so the witness gave him $25.00 (235a); for the same purpose he gave him money on or about September 28, and in the meantime he had given him money for dinner tickets, the first time the early part of September and just before the Democratic dinner in Harrisburg he gave him $100 (235a). As to this $100 item, Tonty stated that a little early in the day Camilli had come to the store and said something about the dinner, and that it was after he communicated with John Messelo, who told him that there actually was a dinner and that they could use some contributions, that Tonty gave Verga five $20.00 bills that afternoon when he came in (236a). On October 15 defendant gave Verga some money in the store and realizing that the campaign was almost over wanted to talk to him, but Verga hurried out of the store and the next day Tonty was arrested (236a-237a).

13. Tonty testified that at no time did he have any intention of corrupting Verga in the performance of his duties, and that he had no reason or motive which would cause him to hand over the money; that he did not have any gambling going on in the premises (237a). He also testified that he knew Mr. Camilli and stated he had not conspired with Camilli to do anything unlawful, and that he had never conspired with anyone to try to bribe Verga; that he did not ever ask Verga for protection and that Verga never did anything to protect his business from the first time he met him down to the date of trial; that he never called Verga on the telephone, and that he never gave Verga any money that he believed Verga was going to use to do anything unlawful in his favor, and that he never intended to bribe him (239a-240a). He denied ever paying Camilli $25.00 and stated that when he heard his voice at the trial on the records he did not think the voice was his; he does not recall talking to Verga on the phone and denied it was his voice on the telephone saying that the $25.00 is the August payment (243a-244a). He stated that in 1950, 1951 and 1952 he gave money to named individuals for the Republican campaign (247a).

14. At the close of the trial defendant's trial counsel moved to dismiss the indictments, which motion was refused (252a). Demurrer to the evidence was filed December 6, 1954 (270a).

15. On December 7, 1954 the jury rendered a verdict finding the defendant guilty as charged but recommended leniency (6a). Motions in arrest of judgment and for a new trial were filed; also additional reasons for a new trial (271a-273a, 275a), all of which were overruled by the court en banc consisting of Judges Evans and Laub.

16. It was the position of the defendant as is shown by the argument filed in the Superior Court, that the bribery charges were not sustained by the evidence, much of the testimony introduced by the Commonwealth being relevant to the charge of conspiracy but having no relation whatever to the three specific charges of bribery. It was not until after the close of the testimony that the trial judge withdrew for the consideration of the jury the charge of conspiracy.

17. It was the position of the defendant in the court below and also in the argument before the Superior Court that the action of the Assistant District Attorney in the grand jury room was so prejudicial as to require the quashing of the indictments. This was the first point argued in the Superior Court and consisted of two sections, (a) the action of the Assistant District Attorney in going into the grand jury room with a gun in his hip pocket and stating to one juror in the presence of all that "he would feel naked without it (gun) if he would run into one of the boys," one of the defendants he meant, and the second part of this prejudicial action was that the Assistant District Attorney acted both as a witness and in his proper capacity as District Attorney. In disposing of the first part of this complaint, namely the gun incident, the Superior Court quoted the answer of Assistant District Attorney Johnson as being that he would "feel naked without it". A reading of the opinion will show that nowhere does the court mention the fact that the reason he "would feel naked without it" would be that "he might run into one of the defendants." The inference to be drawn from this statement requires no further comment and as stated in the appellant's argument

in the Superior Court "the best argument in support of this reason to quash may be found in the dissenting opinion of Judge Rossiter" (157a). Judge Rossiter noted that while "the assistant District Attorney readily took the stand to deny the defendant's allegations as to his prompting both the district attorney and the main prosecuting witness Verga, in the hearing of the grand jury relative to the receipt and allocation of alleged bribe money (filling in the gaps as alleged by defense counsel) he did not see fit to explain the revolver matter". It was the opinion of Judge Rossiter that the gun incident was sufficient to taint all of the indictments and sufficient cause for quashing the same.

18. The second reason why the indictments should have been quashed, as referred to in the foregoing paragraph, is that the Assistant District Attorney acted not only as assistant prosecutor or special attendant upon the grand jury, but also as a witness. In the opinion filed in Commonwealth vs. Schwartz and referred to in the opinion in the above stated case, the Superior Court found that the appellant's claim that the Assistant District Attorney acted irregularly and created prejudice by testifying in person and by prompting witnesses is not definitely established, and, therefore, sustained the action of the court below in refusing to quash the indictments. The opinion also quotes from Commonwealth vs. Brownmiller, 141 Superior Court 107, 116 to the effect that a motion to quash based upon allegations of extraneous factors should not be sustained except in a clear case where the court is convinced that harm has been done to the defendant by improper conduct that interfered with his substantial rights.

19. In 23 C.J.S. 519, section 1081, it is said that "It is the duty of the prosecuting attorney to be fair and impartial in the trial of a person accused of crime", and in the case of Commonwealth vs. Bane, 39 D. and C. 664, the Court of Quarter Sessions of Washington County quashed indictments because of the prejudicial and illegal manner in which the defendants were examined before the grand jury. In the opinion of the judge at page 674:

> "Every man whatever the offense of which he may be suspected is as much entitled to the just, impartial and unbiased judgment of a grand jury as he is to that of a petit jury on his final trial. It is as essential that the one body as the other should be permitted to act freely from sway or control from any source and without fear or favor."

We respectfully refer the Court to the Argument presented for the appellant, pages 18 to 27, inclusive, of the brief for the appellant submitted herewith, for further citation of authorities as to the functions of a prosecuting attorney and his duties, as well as the prejudice which the defendant might have suffered from the gun incident. If the Assistant District Attorney had merely stated that he was wearing the gun "because he would feel naked without it" the conclusion of the Appellate Court as to prejudice or lack of it might be well founded but when we consider that the statement made by the Assistant District Attorney to one grand juror *in the presence of all* that he would feel naked without the gun because he might run into one of the boys, meaning the defendants, the prejudice must of necessity appear from the very wording of the sentence.

20. The next question which was argued by the defendant on the appeal in the Superior Court was the in-

sufficiency of the evidence to convict him of bribery. This point is argued in the brief for the appellant at pages 27 to 39 inclusive. It was submitted there and is repeated here that there was no testimony whatever as to any prior understanding between this defendant and any police officer as to alleged "protection" of gambling on the premises. The defendant readily admitted that he handed some money to Verga, but he says that it was for political purposes and Verga after denying that any of the money was collected for political purposes admitted that he solicited two $10.00 tickets for the Democratic party which was being held for Governor Leader (201a-202a). It is important to note that nowhere in the record will there be found a statement by Verga that any money was given to him by Tonty to protect an illegal business. The defendant relied upon the case of Commonwealth vs. Bausewine, 354 Pa. 35. The Superior Court attempted to distinguish the Bausewine case from this case by stating that in the Bausewine case the "alleged bribery payments to a police officer were strongly denied and the Commonwealth's chief witness was considered an uncertain and unreliable witness". In the Bausewine case the Commonwealth witness testified that Bausewine was paid $50.00 every month from January 1943 up to and including January 1944; that the $50.00 in cash was placed in an envelope and delivered to the defendant at his home. The Commonwealth contended that the purpose of these payments was to protect the Orioles Club in the operation of slot machines. The defendant Bausewine denies he received any money at any time. The Supreme Court found that the evidence adduced by the Commonwealth was insufficient to establish defendant's guilt of the offense of

bribery. In order to decide the Bausewine case as one of law, taking from the jury the question of the credibility of the witnesses, the Supreme Court inferred that the money was actually paid to Bausewine. In our case, the defendant admits that he paid money to the police officers. Therefore, the reason given by the Superior Court in the case at bar for distinguishing the Bausewine case falls. In the Bausewine case it was admitted that the Orioles Club had in operation a number of slot machines; in our case, while the witness Verga testified that he saw the placing of a horse bet and writing numbers on June 30 in defendant's place of business, this was specifically denied by the defendant and his clerk. In the Bausewine case the Supreme Court mentions specifically the fact that there was no evidence of any conversation of Bausewine with anyone connected with the Orioles "with reference to the machines or to the acceptance of any money whatever". In our case likewise there is no evidence of any conversation between the defendant and the police officer with reference to gambling or to the payment and receipt of any money to protect gambling. It is respectfully submitted, therefore, that if it were proper for the Supreme Court to declare as a matter of law the insufficiency of the evidence in the Bausewine case, then it is likewise proper that the insufficiency of the evidence should be declared by the Supreme Court in this case.

21. In connection with the point relative to the insufficiency of the evidence, the defendant presented an argument as to the alleged telephone conversation. The Superior Court disposed of this argument by stating "Appellant now asserts that the telephone conversations were inadmissible as to the bribery charges although they might

have been admissible in connection with the conspiracy charge". * * * There is absolutely no basis for the appellant's argument on this item of evidence as his counsel at the time the records were offered said 'would the Court note that we are not filing or presenting any objection to this evidence' ". We respectfully submit that at the time this evidence was presented both the conspiracy and the bribery charges were before the Court and jury. It was not until the end of the trial and just before the submission of the case to the jury that the trial judge withdrew the conspiracy charges. Therefore, those telephone conversations were admissible as to conspiracy but not as to bribery. The Superior Court also overlooked completely the position taken by the defendant that if the conversation of August 20 be considered as an admission or confession of guilty intent, it is inadmissible to prove the offense of bribery. The reason for this is that before the admission or confession of a defendant is admissible in evidence the corpus delicti of the crime must be proved by independent evidence. The intent to bribe, not merely the intent to give money for an innocent purpose, is an integral part of the crime of bribery. Another objective feature about the telephone conversation was as to the insufficiency of the identification of the defendant as the person who was talking over the telephone. As to the circumstances to be considered in connection with identification of a person talking over a telephone, see Commonwealth vs. Derembeis, 120 Superior Court 158, 166, Commonwealth vs. Kumites, 167 Superior Court 184.

22. The third point raised by the defendant in his argument before the Superior Court was fundamental error in the charge of the Court. This argument is pre-

sented at pages 39 to 47 inclusive of the Brief for Appellant submitted herewith. In one place in the charge at p. 265a the trial judge refers to "this illegal business". Considering the testimony as to gambling on the premises was controverted whether or not an illegal business was being carried on was itself a question for the jury. In his charge the trial judge did not quote the exact words used by Officer Verga but substituted his own version and understanding of what the witness said when he told the jury that "he, Officer Verga, said on June 30, 1954, he went into the news room at 22 W. 12th Street, owned by this defendant, and he talked to him generally about the vice squad and the weather and other things" (257a). It was the position of the defendant that the inference to be drawn from the words "and other things" was so prejudicial to his rights to a fair trial that it amounted to fundamental error because the jury might interpret this phrase as meaning that Tonty offered him a bribe if he would not perform his duty relative to gambling. In Commonwealth vs. O'Brien, 312 Pa. 543, a judgment of conviction was reversed and a new trial granted in a bribery case where the trial judge used his own language in telling the jury what the defendant was alleged to have said instead of using the exact language of the witness. In the O'Brien case there was no exception taken to that portion of the charge but the Supreme Court said it was fundamental error. We respectfully submit that considering the fact that there was no direct evidence of the purpose for which this money was paid, offered by the Commonwealth, in fact there was no direct evidence appearing anywhere in the case that it was a bribe, the statement of the trial judge as to the alleged conversation between the

defendant and Verga, as given above, was most prejudicial.

23. In connection with this point as to the charge, it was submitted that there was fundamental error in that although the trial judge told the jury that they would have for deliberation the three charges for bribery only, nowhere did he tell them that they should not consider the payments of July 20 and October 15 because they did not relate to the bribery charges. The Superior Court found that "The Trial Judge, at least in substance, also withdrew from the jury's consideration the payments of July 20 and October 15". We respectfully submit that the Court was in error in so finding.

24. In conclusion, petitioner respectfully submits:

(a) The Commonwealth wholly failed to prove a crime or crimes under the Penal provisions of the third class city law of 1931, as amended, and that defendant is wholly innocent of the charges therein set forth;

(b) That the Superior Court erred in refusing to apply the ruling of the Supreme Court in the case of Commonwealth vs. Bausewine, supra;

(c) That the action of the Assistant District Attorney before the Grand Jury was so prejudicial per se as to require a reversal of the conviction;

(d) That there is no applicable case of the Pennsylvania Supreme Court relative to a situation where a District Attorney goes into a grand jury room with a gun upon his person and states the purpose of his carrying a weapon, as was done in this case,

and, therefore, it is necessary that a ruling be had deciding this question.

(e) That the defendant did not have a fair trial, as guaranteed by the Constitutions of Pennsylvania and the United States.

A printed copy of the Briefs for Appellant and the Appellee and the Record are filed herewith. The Opinion of the Superior Court is hereto attached.

This petitioner, therefore, respectfully prays that your Honorable Court allow an appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania in these cases with the same effect as if originally taken thereto.

And he will ever pray, etc.

Respectfully submitted,
CHARLES J. MARGIOTTI (s)
SAMUEL GOLDSTEIN
MARGIOTTI & CASEY
EDWARD E. PETRILLO (s)
Attorneys for Petitioner

(Affidavit of petitioner's counsel, and also copy of Opinion of Superior Court attached)

ORDER OF SUPREME COURT OF PENNSYLVANIA

November 16, 1955
Petition Refused
By the Court.